Supreme Court, U. S.
FILED
MAY 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-1582

FELIX WALLS,
Petitioner

vs

GRIFFIN B BELL, ATTORNEY GENERAL, ET AL
~~THE UNITED STATES OF AMERICA~~
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILFRED C. RICE (P 19411)
2436 Guardian Building
Detroit, Michigan 48226
965-7962

ATTORNEY FOR PETITIONER

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CITATIONS OF OPINIONS BELOW

The judgment and commitment of the District Court adjudging Petitioner Guilty of Counts I and II of the Indictment and Concurrent sentences of Ten (10) years dated August 12, 1970. The Order of the District Court dated February 7, 1973, resentencing Petitioner to Concurrent Ten (10) year sentences, as a result of retrial, but releasing him to serve a 7½ to 14 year State sentence, before commencing the Federal sentence. The Order of the Sixth Circuit Court of Appeals affirming the District Court June 29, 1976. Order of the District Court of Southern Indiana, Terre Haute Division denying Petition for Writ of Habeas Corpus January 19, 1977. Order of the Court of Appeals for the Seventh Circuit affirming the Order of the District Court November 4, 1977.

JURISDICTION

The Order of the Court of Appeals was entered November 4, 1977. This Court extended the time for filing Petition for Certiorari to May 7, 1978 by Order of Mr. Justice John Paul Stevens dated February 28, 1978. The jurisdiction of this Court is invoked under Title 28, Sec. 1254(l) U.S.C.

ISSUES PRESENTED

1. Whether a federal judgment and commitment that does not adjudge an accused Guilty and commits him to the custody of the Attorney General of the United States, is a proper Judgment and Commitment, conferring jurisdiction over the prisoner.

2. Is an accused precluded from seeking Title 28

U.S.C. Sec. 2241 relief in the District of his confinement, where Title 28, Sec. 2255 relief has been denied in the District of sentencing?

RELEVANT FACTS

On April 9, 1969, Petitioner was arrested on the charges in the instant cause by federal authorities at Detroit, Michigan, Purchase and Possession of Heroin, in violation of Sec. 4704(a), Title 26 U.S.C., and Sec. 174, Title 21, U.S.C.

In the meantime, Petitioner had been convicted and sentenced to serve four (4) years in the Federal District Court at Dayton, Ohio for violation of Title 18, Sec. 2313 U.S.C. Said conviction was affirmed by the Sixth Circuit Court of Appeals and Petitioner surrendered himself to commence service of his four (4) year sentence October 24, 1969.

Before commencement of both of the aforementioned Federal prosecutions, Petitioner had been arrested in Flint, Michigan in September, 1966 and prosecuted on a State charge of Forgery of a Security Agreement. Said prosecution was dismissed December 12, 1966, but was reinstated approximately two (2) years thereafter. After conviction of said charge, Petitioner was sentenced to serve 7½ to 14 years in State confinement. Petitioner was released on bail pending Appeal.

Petitioner was first convicted on the charges imposed herein and sentenced to serve two concurrent sentences of ten (10) years by the Hon. Fred W. Kaess of the U.S. District Court for the Eastern District of Michigan, Southern Division. Although the ten (10) year sentences were to run concurrently, they were made consecutive to

the four (4) year federal sentence the Petitioner was then serving. At the time of this sentencing, Judge Kaess was fully aware of the 7½ to 14 year state sentence, but made no reference to it in his Judgment and Commitment.[1]

On February 16, 1971, the U.S. Parole Commission paroled Petitioner from the four year Dyer Act conviction into the ten (10) year narcotic sentences.

On June 14, 1971, the United States Court of Appeals for the Sixth Circuit reversed Petitoner's conviction in the instant cause and remanded same for new trial. (See *United States* v. *Walls*, 443 F. 2d 1220)

The second trial, before the Hon. Thomas P. Thornton, resulted in a mistrial.

The third trial of this cause was presided over by the Hon. Charles W. Joiner. After jury verdict of conviction, the Court entered the following Order February 7, 1973:

> "On December 5, 1972, a petit jury returned a verdict of guilty against the defendant Felix Walls on two counts of an indictment for his violation of Section 4704(A) of Title 26 and Section 174 Title 21 United States Code. *By Order of this Court*, the defendant Felix Walls is sentenced to ten years on Count I and ten years on Count II of the above mentioned conviction. The ten years of Count I is to run concurrent with the ten years in on Count II.
>
> On August 4, 1969, a seven and one half to fourteen years sentence was duly imposed on Felix Walls by the Genessee County Circuit Court for the state crime of uttering and publishing a forged security agreement. This conviction was affirmed by both the Michigan Court of Appeals in 1970 and the Michigan Supreme Court in 1972.
>
> There remains time to be served on this sentence by the defendant. *It is by Order of this Court that the defendant be remanded to the custody of the Genessee County Sheriff or his authorized representative for purpose of the defendant's serving the remainder of that state sentence.*" (Emphasis Added)

[1] Under Michigan law, a person in federal custody serving a sentence, gets credit for the time he serves toward the state sentence.

On September 8, 1971, Petitioner was released on bail, pending his retrial on the instant case. On November 17, 1972, Petitioner's bail was cancelled by the Court and he was remanded to Federal custody. The records below do not manifest an intention, on the part of Michigan State officials, to obtain Petitioner's body from Federal authorities for the purpose of serving the State sentence.

On May 10, 1974, Petitioner was paroled by State authorities on the 7½-14 year State sentence. One month later, June 14, 1974, Judge Joiner ordered that Petitioner be arrested by Federal Agents to commence service of the sentence he imposed, on the instant charges, February 7, 1973. Petitioner was so arrested on June 17, 1974.

While in Federal custody at Marion, Illinois, Petitioner filed a Petition for Writ of Habeas Corpus under Title 28, Sec. 2241 in the U.S. District Court for the Eastern District of Illinois December 20, 1974. Said Petition was denied on the grounds that Petitioner had failed to apply for relief in the sentencing Court pursuant to Title 28, Sec. 2255. The date of said denial was March 4, 1975.

Petitioner then filed a Section 2255 Motion in the sentencing Court. The District Court for the Eastern

District of Michigan, Southern Division denied said Motion on April 7, 1975. However, in considering the Motion, the District Judge made the following observation:

> "The particular document that was filed in connection with that sentence is, *indeed, a peculiar document. It is different than any that I have ever seen.* It's one that I signed, any maybe its one that I prepared. I wouldn't be surprised. I really don't have any recollection of having prepared it, but *I am certainly not going to push the blame off onto anybody else at this time.*" (Emphasis Added)

The Sixth Circuit Court of Appeals affirmed the District Court in a "per curiam" Order dated June 29, 1976, stating in part: "The Court being fully advised in the premises concluded that appellant's contentions are either without merit or are not cognizable under 28 U.S.C. 2255."

Having been transferred to Federal custody at Terre Haute, Indiana, Petitioner filed another petition for Writ of Habeas Corpus September 2, 1976. The District Court for the Southern District of Indiana, Terre Haute Division, dismissed said petition "Sua Sponte" on the ground that petitioner had failed to specify in the federal inmate habeas corpus form, in what way his 2255 Motion had been inadequate and/or ineffective as a remedy.

Petitioner thereafter, on October 21, 1976 reapplied for relief for judgment pursuant to Rule 60(b) Federal Rules of Civil Procedure. Said request for relief was denied January 19, 1977. Leave to Appeal said denial was granted by the U.S. Court of Appeals for the Seventh Circuit January 31, 1977.

The Seventh Circuit Court of Appeals affirmed the Order of the District Court November 4, 1977. The time for filing this Petition for Writ of Certiorari has been extended, by this Court, to May 7, 1978.

REASONS FOR GRANTING THE WRIT

I. A FEDERAL JUDGMENT AND COMMITMENT THAT DOES NOT ADJUDGE AN ACCUSED GUILTY AND COMMIT HIM TO THE CUSTODY OF THE ATTORNEY GENERAL OF THE UNITED STATES, IS NOT A PROPER JUDGEMENT AND COMMITMENT, CONFERRING JURISDICTION OVER THE PRISONER.

The order of commitment, in the instant cause, did not adjudge the petitioner guilty, nor commit him to the custody of the Attorney General of the United States.[1] Such a committing order does not vest authority in the Attorney General to imprison an accused. Accordingly, Petitoner is being illegally restrained of his liberty, by the respondents.

Rule 32(b)(1) of the Federal Rules of Criminal Procedure mandates the "Sentence and Judgment" procedure to be employed by federal district courts, as follows:

> "A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged,

[1] A true copy of the Court's committing order may be found in the Appendix at page 17a.

judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk. (See also, Title 18, Sections 3771 and 3772 U.S.C.)

This Court noted in *United States* v. *Hark*, 320 U.S., 531, 534, 64 S. Ct. 359, 88L. Ed. 299, that: "The judgment of a Court is the judicial determination or sentence of the Court upon a matter within its jurisdiction." Here, the district court had no authority to release Petitioner from valid federal custody and order that he serve a state sentence; but he did. Such an order is tantamount to suspending the imposition of sentence, but for, the portion of the order, which directs that petitioner serve a state sentence, which was unquestionably outside of the district court's authority.

Moreover, releasing of federal jurisdiction over the petitoner in favor of state jurisdiction on another matter, was in violation of the Interstate Agreement on Detainers and synonomous to paroling Petitioner on the federal charges. *Stroble* v. *Egeler*, 408 F. Supp. 635.

Also, the mechanics employed by the district court, in the instant cause, works out as a penalty against the petitioner for having successfully appealed his first conviction, in more ways than one, which clearly contravenes this Court's decision in *North Carolina* v. *Pearce*, 395 U.S. 711.

First, the sentence of February 7, 1973 was not in accord with the sentence imposed after the first conviction August 12, 1970; in that the second sentence enhances the period of Petitioner's incarceration, by releasing federal custody in favor of a state sentence and suspending the service of the federal sentence, and (2) delay of the federal sentence, of necessity, extended the time of Petitioner's parole considerations.

Presently, Petitioner has approximately six (6) years and eight (8) months service on a ten (10) year sentence, if he were given proper credits, but for the district court releasing him to state custody, which is more than enough time to be served on a ten (10) year sentence.

The government argues that, the issues Petitioner herein raises have been adjudicated in the Eastern District of Michigan and affirmed by the Sixth Circuit Court of Appeals, but that contention is incorrect, the Sixth Circuit has consistently ruled that, habeas corpus relief from illegal detention can only be applied for in the District of incarceration. (See *Melvin Lemmons* v. *United States*, E.D. Mich. Docket No. 7-70956)

While the issue here raised is of immeasurable importance to the Petitioner, it is also, of great importance to the administration of criminal justice, which could settle questions that may be the subject matter of many future petitions for Writ of Certiorari.

II. AN ACCUSED IS NOT PRECLUDED FROM SEEKING TITLE 28 U.S.C., SEC. 2241 RELIEF IN THE DISTRICT OF HIS CONFINEMENT, WHERE TITLE 28, SEC. 2255 RELIEF HAS BEEN DENIED IN THE DISTRICT OF SENTENCING.

In the instant case, the district court committed the Petitioner to the custody of state authorities, not to the custody of the Attorney General of the United States, as the law requires. *United States* v. *Herb*, 436 F. 2d 566, 568; Title 18, Sec. 4082 U.S.C. The government agrees that this was error. However, the government argues that, this issue has been laid to rest by the decision of the Sixth Circuit Court of Appeals. This contention is clearly incorrect. The Sixth Circuit Court of Appeals' Order,

stated in pertinent part, as follows: "The Court being fully advised in the premises concludes that appellant's contentions are either without merit or are not cognizable under 28 U.S.C., Sec. 2255."

Petitioner, then, filed for consideration in the district of his incarceration, which ruled that he had to seek relief in the district of sentencing. The district of sentencing has consistently ruled, as does the Sixth Circuit that, such relief as Petitioner seeks must be sought via Title 28, Sec. 2241 in the District of incarceration.

Petitioner, *pro se*.—initiated the present petition, which was first dismissed, because, the Petitioner, a layman, without legal training, neglected to specify how his 2255 petition, in the district of sentencing, is inadequate. That question was clearly answered by the Sixth Circuit, in its declaration that, the relief sought by the Petitioner is not cognizable under 28 U.S.C. Sec. 2255. Contrary to the suggestion of the District Court of Southern Indiana, the Sixth Circuit did not single out certain portions of the 2255 petition, in the Eastern District of Michigan as cognizable thereunder and other parts as not. The Court said, "Appellant's *contentions*" are not cognizable through 2255 petition.

The Petitoner has been juggled from one court to another, seeking to have his right to relief considered on the merits. Title 28, Sec. 2241 grants him that right, in the district of incarceration. The Seventh Circuit Court of Appeals has mistakenly concluded that, the Sixth Circuit decided the merits of the same issues that Petitioner presented in his 2241 petition in the Southern District of Indiana. The issues presented in the Sixth Circuit addressed the question of the validity of the sentencing procedure employed by the district court for the Eastern District of Michigan. However, the issues presented to

the Southern District of Indiana questions the right of the Attorney General and the Prison Warden to maintain custody of the Petitioner, where the Petitioner has never been properly committed to their custody and, the Attorney General neglected his obligation to designate Petitioner's place of confinement, within a reasonable time after sentencing February 7, 1973. After said sentencing, the Attorney General maintained custody of Petitioner. He had no obligation to comply with Judge Joiner's Order to turn Petitioner over to state authorities, once the Petitioner had been meeted the concurrent ten (10) year sentences. He had the obligation to designate Petitioner's place of confinement, irrespective of Judge Joiner's Order. *United States* v. *Herb*, supra.

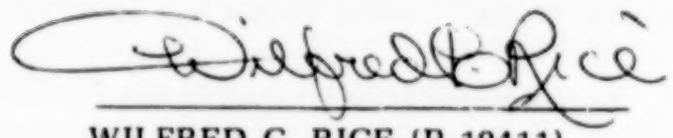
As redress for the wrongs to the Petitioner herein, we contend that, at a bare minimum, the Petitioner should be accredited with the time spent in the state institution, toward his federal sentence, because, the Attorney General's release of the Petitioner, from his lawful custody, to state authorities was tantamount to ratification of the designation made by Judge Joiner.

It would be a manifest injustice for Petitioner to lose some fourteen (14) months credit toward his sentence, due to judicial and administrative error, over which he has no control.

CONCLUSION

We respectfully pray that this Honorable Court will grant our Petition for Writ of Certiorari, in this case, because, the Petitioner is the recipient of manifestly unjust decisions, which are in conflict with decisions of this Court, as well as other decisions of their own courts and there exists, in this litigation, substantial federal questions, which should be settled.

Respectfully submitted,



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United States District Court
FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America

v. No. 44061

Felix Walls.

On this 12th day of August, 1970 came the attorney for the government and the defendant appeared in person and[1] with Wilfred C. Rice, his attorney.

It is adjudged that the defendant upon his plea of[2] "not guilty, and a finding of guilty," has been convicted of the offense of PURCHASE AND POSSESSION OF HEROIN Vio: Section 4704(a), Title 26, USC., and Section 174, Title 21, USC., as charged[3] in the two count indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Ten (10) years on Count 1; Ten (10) years on Count 2, said sentences to run concurrently.

IT IS FURTHER ADJUDGED that the sentences herein imposed are to run consecutively to the present

federal sentence the defendant is now serving at the Federal Penitentiary at Terra Haute, Indiana.

It is adjudged that[5] the appearance bond of said defendant be and the same is hereby cancelled.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to[6]

Fred W. Kaess
United States District Judge.

Frederick W. Johnson
Clerk.

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[1] Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2]Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number " if required [4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court to recommend a particular institution.

United States District Court
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES,
Plaintiff,

vs. Criminal No. 44061

FELIX WALLS,
Defendant.
_____/

JURY VERDICT

At a session of said Court, held in the Federal Building, Detroit, Michigan, on December 5, 1972.

PRESENT: HONORABLE CHARLES W. JOINER
UNITED STATES DISTRICT JUDGE

The jurors heretofore empaneled and sworn, come into court again and sit together, and having heard the arguments of counsel and charge of the Court, retire from the bar thereof under charge of an officer (duly sworn for that purpose) to consider their verdict; and after being absent for a time come into Court again and in the presence of said defendant say upon their oaths they find the defendant Felix Walls GUILTY of the charges containe in counts 1 and 2 of the Indictment.

Whereupon the jury is excused from further consideration of the case, the matter referred to the Probation Department for pre-sentence report and the

defendant is remanded to the custody of the United States Marshal.

Examined, approved and ordered entered.

Charles W. Joiner
United States District Judge

United States District Court
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,
Plaintiff,

v. Criminal No.: 44061

FELIX WALLS,
Defandant.

ORDER

On December 5, 1972, a petit jury returned a verdict of guilty against the defendant, FELIX WALLS, on two counts of an indictment for his violation of Section 4704(a) of Title 26 and Section 174 of Title 21, United States Code.

By Order of this Court, the defendant, FELIX WALLS, is sentenced to ten (10) years on Count I and ten (10) years on Count II of the above mentioned conviction. The ten (10) years in Count I is to run concurrent with the ten (10) years in Count II.

On August 4, 1969, a seven and one half to fourteen (7½-14) year sentence was duly imposed on FELIX WALLS by the Genesee County Circuit Court for the State crime of uttering and publishing a forged security agreement. This conviction was affirmed by both the Michigan Court of Appeals in 1970 and the Michigan Supreme Court in 1972. There remains time to be served on this sentence by the defendant.

It is by Order of this Court that the defendant be

remanded to the custody of the Genesee County Sheriff or his authorized representative for purposes of the defendant serving the remainder of that state sentence. On completion of the defendant serving the State sentence, or on his parole from that sentence, he is to commence serving his federal time of ten (10) years on Count I and ten (10) years on Count II. Said ten (10) years federal sentences to run concurrently.

The Court recognizes that the defendant has served some time on the federal sentence and in no way means to discredit that time served.

Charles W. Joiner
United States District Judge
Eastern District of Michigan

Dated: Feb. 7, 1973

United States District Court
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

FELIX WALLS,
Defendant.

Criminal No. 44061
CCA Docket No. 73-1417

_____/

ORDER

The defendant was found guility of violating Sections 174 of Title 21 and 4707(c) of Title 26, United States Code, and was sentenced by this Court to serve a term of ten (10) years for that conviction. On November 1, 1973, the Court of Appeals affirmed the conviction and on May 13, 1974 the United States Supreme Court denied the petition for writ of certiorari.

The defendant having exhausted his appeals,

IT IS HEREBY ORDERED that Federal agents bring the defendant forthwith to the nearest office of the United States Marshal for purposes of commencing his sentence.

Charles W. Joiner
United States District Judge

Dated: Jun 14 1974

On June 17, 1974 within named delivered to Oakland Co. Jl., Pontiac, Mich.

On 7-12-1974, within named delivered to United States Penitentiary at U.S.P.—Marion, Ill. the institution designated by the Attorney General of the United States.

Floyd E. Carrier
United States Marshal—W-Okla.

By: L. Earnest
DVSM

In the District Court of the United States
FOR THE EASTERN DISTRICT OF ILLINOIS

FELIX WALLS,
Petitioner.

vs. CIVIL NO. 753018

WILLIAM SAXBE, et. al.,
Respondent.

ORDER

FOREMAN, Judge:

Now before the Court is respondent's Motion to Dismiss petitioner's habeas corpus action.

Respondent moves for dismissal on the ground that petitioner fails to allege that he has previously sought relief in the sentencing court. 28 U.S.C. §2255 requires that a prisoner seeking release from custody must first bring his claims in the sentencing court. Since petitioner fails to allege that he has filed such an action, respondent's Motion to Dismiss must be GRANTED.

IT IS SO ORDERED.

DATED: March 4, 1975.

James L. Foremer
United States District Judge

United States District Court
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FELIX WALLS,
Petitioner,

v.

Civil Action
No. 5-70311

UNITED STATES OF AMERICA,
Respondent

_____/

JUDGMENT

The petitioner's motion to vacate sentence came on for hearing before the court, Honorable Charles W. Joiner, United States District Judge, presiding, and the issues having been considered and a decision rendered in open court on April 7, 1975,

IT IS ORDER AND ADJUDGED that the case be dismissed with prejudice against the named respondent.

Dated at Detroit, Michigan, this 16th day of April, 1975.

Henry R. Hanssen
Clerk of the Court

Approved as to form:
CMJ

by MaryAnn Goldsberry
Deputy Clerk

NO. 75-1927

United States Court of Appeals
FOR THE SIXTH CIRCUIT

FELIX WALLS
Petitioner-Appellant

v.

ORDER

UNITED STATES OF AMERICA
Respondent-Appellee

_____

Before: PHILLIPS, Chief Judge, and EDWARDS and PECK, Circuit Judges.

This appeal, perfected from an order denying petitioner-appellant relief under a motion to vacate an order entered pursuant to jury verdict finding him guilty of narcotics violations under 26 U.S.C. §4704(a) and 21 U.S.C. § 174, has been submitted on the record of appeal and on the briefs and oral arguments of counsel for the parties. The court being fully advised in the premises concludes that appellant's contentions are either without merit or are not cognizable under 28 U.S.C. §2255, and accordingly,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

Clerk

United States Court of Appeals
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

(ARGUED NOVEMBER 3, 1977)

NOVEMBER 3, 1977

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

FELIX WALLS,
Petitioner-Appellant,

vs.

No. 77-1115
EDWARD LEVI and J. D. WILLIAMS,
Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana,
Terre Haute Division
No. TH 76-139-C
S. HUGH DILLIN, *Judge.*

ORDER

The Court, having read the briefs, addressed itself to the record, and heard oral argument in behalf of appellant, announced in open court that the judgment appealed from is AFFIRMED.

*Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

The sentencing court had the power to delay commencement of the federal term until completion of the state sentence, and in any event, that question has been determined by the courts in the Sixth Circuit. This leaves no substance to the claim that the Attorney General failed to exercise his discretion or to perform his duty.

Accordingly, the Clerk of this Court is directed to enter judgment AFFIRMING the judgment appealed from.

Supreme Court of the United States

NO. A-720

FELIX WALLS,
Petitioner

v.

GRIFFIN BELL, ATTORNEY GENERAL, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 7, 1978.

/s / John Paul Stevens
Justice of the United States.

Dated this 28
day of February, 1978

United States District Court
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

FELIX WALLS)
)
vs.)
) TH 76-139-C
EDWARD LEVI)
)
J. D. WILLIAMS)

ENTRY

This cause comes before the Court on the petitioner's Motion for Relief From Judgment on Order Pursuant to Federal Rule of Civil Procedure 60(b). The Court, having considered the motion and being duly advised now denies the motion.

This cause was filed September 2, 1976. On September 20, 1976, this Court entered its entry dismissing the petition. The dismissal was based on the statement of this Court's form of petition that petitioner had previously filed a motion pursuant to 28 USC §2255 and that motion had been denied, which motion appeared to raise the same issues as this application. The dismissal was based further on the petitioner's failure to complete question 13 on this Court's form—why, if the action under §2255 was denied, was such action inadequate or ineffective to test the legality of his detention.

At this time, petitioner, now by counsel, seeks to remedy the omission to answer question 13 citing excusable neglect on the part of the pro se petitioner and

confusion about the meaning of the Court of Appeals for the Sixth Circuit ruling.

The facts are stated in this Court's prior opinion. Suffice it to say that the primary issue in this action is the propriety of the action of the sentencing court in remanding petitioner to state custody to conclude his state sentence while his federal appeal was pending.

This Court has taken the liberty of obtaining copies of the petitioner's motion filed in the Eastern District of Michigan, the government's response and a transcript of the court's hearing. These taken together with the petitioner's petition here prove without a suggestion of doubt that the precisely identical issue is raised by petitioner in both actions.

Learned counsel for petitioner suggests that he failed to properly "frame" the issue to put it into §2241 form. However, a comparison of paragraphs 2 and 4 of petitioner's attempt to state the issue and counsel's attempt to state the issue do not vary materially. The sole issue in either statement is the proprietary of the actions of the sentencing judge—a prototypical §2255 question.

Counsel never does state wherein the motion under §2255 is ineffective or inadequate. The Court there decided the issue presented; the Court of Appeals affirmed. The Court can only conclude, as it did before, that the inadequacy of the trial court's ability to determine the issue from petitioner's standpoint was that the determination was adverse. The insufficiency of that ground is clear.

Further, petitioner has changed his position. Initially petitioner filed a similar habeas corpus in the Eastern District of Illinois. That was dismissed because Judge

Foreman concluded as this Court has concluded, and as Judge Joiner and the Sixth Circuit have concluded, that the matter was cognizable as a §2255 motion. Now petitioner argues that it was properly cognizable as a §2241 petition; however, if that is petitioner's view, he should have appealed the initial dismissal in the Eastern District of Illinois.

Lastly, the petitioner contends that the wording of the Court of Appeals' opinion affirming the decision of Judge Joiner led him to believe he had a habeas remedy. The Court stated petitioner's claims "are either without merit or are not cognizable under 28 USC § 2255." A review of the §2255 motion and the District Court's transcript makes it clear the items "not cognizable under §2255" were claims that should have been raised on appeal and were not proper §2255 claims for that reason.

Petitioner was convicted by a jury and his conviction affirmed on appeal. Petitioner raised these very issues by motion under §2255, the denial of that motion was also affirmed on appeal. Petitioner now seeks to raise these same issues by habeas corpus. At some point in every case, even a prisoner's case, the ability of a party to relitigate the same issue must reach an end. That point has clearly been reached here. Accordingly, the motion

for relief from the judgment is denied.

Dated this 19th day of January, 1977.

S. Hugh Dillin
Judge, United States District Court

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No. 77-1582

Supreme Court, U. S.
FILED
JUN 27 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

FELIX WALLS, PETITIONER

v.

GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

LAWRENCE G. WALLACE,
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1582

FELIX WALLS, PETITIONER

v.

GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that his petition for a writ of *habeas corpus* under 28 U.S.C. 2241 should not have been denied despite the fact that a motion to vacate his sentence under 28 U.S.C. 2255, raising the same issues, had previously been denied after an evidentiary hearing by the sentencing court.

1. After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on a two-count indictment charging that he had purchased and possessed narcotics in violation of 26 U.S.C. (1964 ed.) 4704 and 21 U.S.C. (1964 ed.) 174.[1]

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[1]Petitioner had been tried and convicted on this indictment once before, in 1970 (Pet. App. 13a). This conviction was reversed because the trial judge had viewed the scene of the offense without defendant or his counsel being present, and because defense counsel was denied an opportunity to present a summation and closing argument. *United States* v. *Walls*, 443 F. 2d 1220 (C.A. 6).

Petitioner was sentenced to concurrent terms of ten years' imprisonment on each count, the sentence to be served after completion of an existing state sentence for uttering and publishing a forged security agreement. The court of appeals affirmed. *United States* v. *Walls*, 486 F. 2d 1405 (C.A. 6), certiorari denied, 416 U.S. 983.

Petitioner thereafter filed a petition for a writ of *habeas corpus* under 28 U.S.C. 2241 in the district of his confinement (Eastern District of Illinois), alleging that the trial court had improperly sentenced him by ordering the state sentence to be completed prior to imprisonment on the federal convictions.[2] The district court denied the petition, ruling that claims of illegality in the sentence must be raised in the sentencing court under 28 U.S.C. 2255 (Pet. App. 21a). Petitioner did not appeal that judgment, but instead filed a petition in the sentencing court to vacate his sentence under 28 U.S.C. 2255. The sentencing court denied petitioner's application after a hearing (Pet. App. 22a), and the court of appeals affirmed. *Walls* v. *United States*, 538 F. 2d 331 (C.A. 6), certiorari denied, 430 U.S. 947.

Petitioner then renewed his attack on the legality of his sentence by filing another petition for a writ of *habeas corpus* under 28 U.S.C. 2241.[3] The district court held that petitioner had failed to show that the previous challenge

[2]Petitioner's federal trial began while he was free on bail pending appeal from his state convictions. The state convictions were affirmed during petitioner's federal trial. The district court's sentence on the federal convictions specifically directed that petitioner was to be delivered to state authorities for the completion of his state sentence (Pet. App. 18a). After serving one and one-half years of his state sentence, petitioner was paroled, and he is now serving his term of federal imprisonment.

[3]By this time, petitioner had been transferred to a federal prison in Indiana, and the petition was therefore filed in the United States District Court for the Southern District of Indiana.

to his sentence in the sentencing court under 28 U.S.C. 2255 had been "inadequate or ineffective" and concluded that petitioner was therefore not entitled to further review of the same claim in the *habeas corpus* proceeding (Pet. App. 27a-30a). The court of appeals affirmed, holding that petitioner's claim had already been reviewed by the sentencing court and that, in any event, petitioner's sentence was valid. *Walls* v. *Levi*, 567 F. 2d 391 (C.A. 7) (Pet. App. 24a-25a).

2. Petitioner claims that the courts below erred in denying his petition for a writ of *habeas corpus*. This claim is insubstantial.

a. The district court correctly held that petitioner may not renew his challenge to the legality of his sentence in a federal *habeas corpus* proceeding. Under 28 U.S.C. 2255, the sentencing court is the exclusive forum in which to initiate challenges to the legality of federal criminal sentences.[4] See, *e.g.*, *United States* v. *Hayman*, 342 U.S. 205; *Miller* v. *United States*, 564 F. 2d 103, 105 (C.A. 1); *Short* v. *United States*, 504 F. 2d 63 (C.A. 6). Only after the claim has been raised and rejected in the sentencing court may relief be sought by writ of *habeas corpus*; and then only in the extraordinary circumstance in which the petitioner can show that the proceedings in the sentencing court were "inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255. See *Sanders* v. *United States*, 373 U.S. 1, 14-15; *United States* v. *Hayman*, *supra*, 342 U.S. at 223.

[4]28 U.S.C. 2255 provides in part:

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> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Petitioner's challenge to the legality of his sentence was previously raised and rejected in the sentencing court (Pet. App. 22a). The claims he raised at that time were identical in substance to those involved in this case (Pet. App. 28a).[5] Petitioner has failed to demonstrate any basis for a claim that the proceedings in the sentencing court were inadequate or ineffective (Pet. App. 28a), and accordingly the district court properly dismissed the petition in this case.

b. The court of appeals also correctly ruled (Pet. App. 24a-25a) that petitioner's substantive contention lacks merit. Petitioner's argument amounts to a claim that a federal sentence may not be made consecutive to a state sentence. It has long been held, however, that a defendant convicted of federal crimes may be required to complete his term of state imprisonment prior to the commencement of the federal sentence. *E.g., Cox* v. *United States ex rel. Arron*, 551 F. 2d 1096 (C.A. 7); *Chaney* v. *Ciccone*, 427 F. 2d 363 (C.A. 8); *Casados* v. *United States*, 413 F. 2d 291 (C.A. 5).

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[5]In both cases, the controlling issue raised by petitioner was the propriety of the sentence remanding petitioner to state custody to conclude his state sentence prior to the beginning of the terms of federal imprisonment.

Petitioner asserts in this Court a claim that was not raised below. He claims (Pet. 8) that his sentence after retrial was more severe than the sentence he received after his initial trial and therefore contravened *North Carolina* v. *Pearce*, 395 U.S. 711. This claim may only be raised in the sentencing court by means of a motion pursuant to 28 U.S.C. 2255. In any event, the claim is insubstantial. The ten-year term of imprisonment imposed after retrial was identical to the term imposed after the initial trial (see Pet. App. 13a, 17a-18a). The sentence after retrial did specify that the term was to be served after completion of the state conviction that had just been upheld on appeal. But *Pearce* is not violated by the court's consideration of this circumstance that had intervened since the initial conviction (see *United States* v. *Pacelli*, 521 F. 2d 135, 141 n. 6 (C.A. 2), certiorari denied, 424 U.S. 911), particularly where, as here, the sentence imposed after the second trial involved no increase in the term of federal imprisonment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE,
*Acting Solicitor General.**

JUNE 1978.

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*The Solicitor General is disqualified in this case.

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